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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRIN T. HACKETT, ORDER
Petitioner-Appellant,

v.

ROBERT J. KAPTURE, WARDEN KINROSS CORRECTIONAL FACILITY,
Respondent-Appellee.

BEFORE: MOORE and COLE, Circuit Judges; and MARBLEY, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Hon. Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Nos. 03-1421/1501

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRIN T. HACKETT,

Petitioner-Appellant,

V. ORDER

ROBERT J. KAPTURE, Warden Kinross Correctional Facility,

Respondent-Appellee.

Before: MOORE and COLE, Circuit Judges; MARBLEY, District Judge.*

Darrin T. Hatchett, a Michigan state prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. This case has been referred to a panel of the court pursuant to Rule 34(i)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In late 1986 or early 1987, Hatchett was charged as a fifteen-year-old with first-degree murder and possession of a firearm during the commission of a felony (felony firearm). On March 10, 1987, the juvenile division of the probate court held an evidentiary hearing to determine whether the court should waive jurisdiction so that Hatchett could be tried as an adult in circuit court. At the conclusion of the hearing, the juvenile court waived jurisdiction.

*The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Hatchett retained attorney Charles Campbell to represent him after the waiver hearing. Campbell represented Hatchett at the preliminary examination in state district court, but he did not appeal the juvenile court's decision to waive jurisdiction. Hatchett then was bound over to the former Recorder's Court for the City of Detroit, Michigan, where he was represented by a different attorney (Rene Cooper). Following a bench trial on September 29, 1987, the trial court found Hatchett guilty of second-degree murder, and felony firearm. The trial court sentenced Hatchett to two years in prison for the felony firearm conviction and to life imprisonment, with the possibility of parole, for the murder conviction.

Hatchett filed an appeal of right through still another court-appointed attorney (Roman Karwowski). Karwowski argued that the evidence was insufficient to sustain the murder conviction and that Hatchett was entitled to re-sentencing because the sentence was excessive. The Michigan Court of Appeals affirmed Hatchett's conviction and sentence in an unpublished, per curiam opinion. The Michigan Supreme Court denied leave to appeal because it was not persuaded that the questions presented should be reviewed.

On September 29, 2000, Hatchett filed his habeas corpus petition through counsel. He raised two substantive grounds for relief:

I. Mr. Hatchett is entitled to a new trial because he received constitutionally ineffective assistance from three different appointed attorneys, one of whom was entirely absent as proceedings were conducted, and another of whom inexplicably allowed. his right to appeal his waiver into Recorder's Court lapse without action, and the last of whom failed to raise any of these issues on appeal.

II. Mr. Hatchett's due process rights were violated when the Recorder's Court Judge failed to strike inaccurate information from the presentence report.

Hatchett supplemented his habeas petition with a third claim, which alleged that his right to due process was violated "by the prosecution's Motion to waive in violation of MCR 5.904(A)." The respondent moved for summary judgment on the ground that the statute of limitations barred habeas review, but on August 8, 2001, the district court denied the respondent's motion. The respondent then filed an answer to the habeas petition, arguing that Hatchett had procedurally defaulted his claims in state court by failing to raise them on direct appeal or in his first motion for relief from judgment. On April 11, 2002, the district court rejected the respondent's procedural default argument, but dismissed Hatchett's second and third claims, as well as his claim about attorney Jerome Crawford, on the merits.

The only issues that remained before the district court were Hatchett's claims that attorneys Charles Campbell and Roman Karwowski provided ineffective assistance. Oral argument on these claims were held on

February 19, 2003. The district court denied habeas corpus relief after concluding that Campbell's failure to appeal the waiver of juvenile jurisdiction did not prejudice Hatchett and that, to set aside Hatchett's conviction could result in a windfall to which the law does not entitle him. The district court found no merit in Hatchett's claim about his appellate attorney (Karwowski) because Campbell's performance did not prejudice Hatchett. The court granted Hatchett a certificate of appealability as to the ineffective assistance of counsel claim regarding attorneys Campbell and Karwowski. Hatchett then filed two duplicative notices of appeal (appeal No. 03-1421 and appeal No. 03-1501). The two resulting case numbers have been consolidated.

We review de novo a district court's legal conclusions in habeas corpus actions and review its factual findings for clear error. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir.1999). A district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (2) was based on an unreasonable determination or me facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).

On appeal to this court, Hatchett claims that the district court applied an incorrect legal standard when it interpreted the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984) to mean that Hatchett's counsel was constitutionally ineffective for not filing an appeal from the juvenile court's decision to waive jurisdiction only if Hatchett could show that the appeal was meritorious. Hatchett argues that to prove

his ineffective assistance of counsel claim under the Sixth Amendment, he need not show the merit of his appeal, but must show (1) that counsel's representation fell below an objective standard of reasonableness, *Strickland*, 466 U.S. at 687, and (2) that counsel's deficient performance prejudiced the defendant. *Id.* at 692. We agree.

Prejudice is sufficient to satisfy the second prong of *Strickland*. Prejudice is presumed from counsel's failure to file a notice of appeal when requested by his client. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). The district court, however, concluded that Hatchett must in addition demonstrate in his 28 U.S.C. 2254 petition that his appeal had some merit. In *Roe*, the Supreme Court held that counsel's failure to pursue an appeal requested by a defendant constitutes ineffective assistance of counsel regardless of the likelihood of success on the merits. *Id.* at 486. Moreover, even if a defendant does not specifically instruct counsel to file an appeal, counsel may still have a duty to consult with his client about an appeal. *Id.* at 478-80.

The record in this case does not indicate why Campbell did not appeal the juvenile court's waiver of jurisdiction. One of Hatchett's uncles has indicated in an affidavit that he and his brother retained Campbell to appeal the juvenile court's waiver of jurisdiction. Campbell moved to adjourn the preliminary examination in the state district court, stating that this was a waiver from juvenile court and "[w]e have to study all of that and consider our options there and here. . . ." Later, however, he agreed to proceed with the preliminary examination. Because Hatchett's uncle retained counsel to appeal, it is clear that Hatchett would have appealed. Therefore, the district court erred

in dismissing Hatchett's habeas petition as to this claim by examining the potential merits of a possible appeal.

Accordingly, the district court's judgment as to this ineffective assistance of counsel claim is vacated and the case is remanded for consideration in light of *Roe*. Appeal No. 03-1501 is dismissed as duplicative of appeal No. 03-1421, Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARRIN T. HATCHETT,
Petitioner,
v. CASE NO. 00-CV-74340-DT
HONORABLE NANCY G. EDMUNDS

ROBERT J. KAPTURE,
Respondent.

OPINION AND ORDER DENYING HABEAS CORPUS PETITION

This matter is pending before the Court on petitioner Darrin T. Hatchett's habeas corpus petition filed under 28 U.S.C. § 2254. For the reasons set forth below, the habeas petition shall be denied.

I. Background

This case arose when Petitioner was charged as a fifteen-year-old with first-degree murder and possession of a firearm during the commission of a felony (felony firearm). On March 10, 1987, the juvenile division of the probate court held an evidentiary hearing to determine whether the court should waive jurisdiction so that Petitioner could be tried as an adult in circuit court. At the conclusion of the hearing, the probate court waived jurisdiction.

Petitioner retained attorney Charles Campbell to represent him after the waiver hearing. Campbell represented Petitioner at the preliminary examination in state district court, but he did not appeal the probate court's decision to waive jurisdiction. Petitioner then

was bound over to the former Recorder's Court for the City of Detroit, Michigan, where he was represented by a different attorney. Following a bench trial on September 29, 1987, the trial court found Petitioner guilty of second-degree murder, MICH. COMP. LAWS § 750.317, and felony firearm, MICH. COMP. LAWS § 750.227b. The trial court sentenced Petitioner to two years in prison for the felony firearm conviction and to life imprisonment, with the possibility of parole, for the murder conviction.

Petitioner appealed his conviction and sentence through attorney Roman Karwowski, who argued that the evidence was insufficient to sustain the murder conviction and that the sentence was excessive. The Michigan Court of Appeals found no merit in the claims and affirmed Petitioner's conviction and sentence in an unpublished, *per curiam* opinion. See *People v. Hatchett*, No.104510 (Mich. Ct. App. Mar. 10,1989). The Michigan Supreme Court denied leave to appeal because it was not persuaded that the questions presented should be reviewed. See *People v. Hatchett*, No. 85743 (Mich. Sup. Ct. Nov. 29, 1989).

In 1992, Petitioner filed a pro se motion for relief from judgment in the trial court. The trial court denied Petitioner's motion in a reasoned opinion. On March 14; 1994; the trial court vacated its previous order because Petitioner had asked to withdraw his motion before the trial court denied it.

On September 3, 1997, Petitioner filed a second motion for relief from judgment. The trial court denied the motion because, in its opinion, Petitioner had failed to meet the stringent standards of Michigan Court Rule 6.508(D)(3). Petitioner appealed the trial court's decision, but the Michigan Court of Appeals denied

leave to appeal, citing Michigan Court Rule 6.508(D). See *People v. Hatchett*, No. 209790 (Mich. Ct. App. Mar. 1, 1999). On September 29, 1999, the Michigan Supreme Court likewise denied leave to appeal. See *People v. Hatchett*, 461 Mich. 877; 602 N.W.2d 580 (1999) (table).

On September 29, 2000, Petitioner filed his habeas corpus petition through counsel. He raised two substantive grounds for relief:

> I. Mr. Hatchett is entitled to a new trial because he received constitutionally ineffective assistance from three different appointed attorneys, one of whom was entirely absent as proceedings were conducted, and another of whom inexplicably allowed his right to appeal his waiver into Recorder's Court lapse without action, and the last of whom failed to raise any of these issues on appeal.
>
> II. Mr. Hatchett's due process rights were violated when the Recorder's Court Judge failed to strike inaccurate information from the presentence report.

Petitioner supplemented his habeas petition with a third claim, which alleged that his right to due process was violated "by the prosecution's Motion to Waive in violation of MCR 5.904(A)."

Respondent moved for summary judgment on the ground that the statute of limitations barred habeas review, but on August 8, 2001, the Court denied Respondent's motion. Respondent then filed an answer to the habeas petition, arguing that Petitioner had

procedurally defaulted his claims in state court by failing to raise them on direct appeal or in his first post-conviction motion. On April 11, 2002, the Court rejected Respondent's procedural default argument, but dismissed Petitioner's second and third claims, as well as his claim about attorney Jerome Crawford, on the merits.

The only issues currently before the Court are Petitioner's claims that attorneys Charles Campbell and Roman Karwowski provided ineffective assistance. Oral arguments on these claims were held on February 19, 2003.

II. Standard of Review

Petitioner is entitled to the writ of habeas corpus only if he can show that the state court's adjudication of his claims

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(4).

This deferential standard applies even when a state court fails to articulate its reasoning for a decision on the merits. *Onifer v. Tyszkiewicz*, 255 F.3d 313, 316 (6th Cir.) *cert. denied*, 534 U.S. 930 (2001). The question in such circumstances is "whether the state

court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented..... *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001)). A federal court's independent review of the record remains deferential to the state court's result. *Id.*

III. Discussion

Petitioner alleges that Charles Campbell, who represented him after the juvenile waiver hearing, should have appealed the probate court's decision to waive jurisdiction. Petitioner contends that his appellate attorney, Roman Karwowski, should have ordered the probate court transcripts and raised the issue on appeal or argued that Campbell's representation was ineffective.

A. *Strickland v. Washington*

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that defense counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is "reasonably effective assistance." *Id.* The petitioner must demonstrate that his attorney's "representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong of the Strickland test requires demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"*Strickland* qualifies as clearly established federal law under § 2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 391(2000)." *Monzo v. Edwards*, 281 F.3d 568, 583 (6th Cir. 2002). The question then is whether the state court's denial of relief "is contrary to federal law. unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented..... *Harris*, 212 F.3d at 943.

B. Waiver of Probate Court Jurisdiction

A juvenile court's determination of whether to waive jurisdiction is a "critically important" proceeding. *Kent v. United States*, 383 U.S. 541, 560 (1966). At the time of the offense in this case, the juvenile division of the probate court had exclusive original jurisdiction over a person under the age of 17 who was alleged to have violated a state or federal criminal law. *Dickens v. Jones*, 203 F. Supp. 2d 354, 361(E.D. Mich. 2002) (Tarnow, J.). The probate court was required to follow a two-step process. First, the court had to determine whether there was probable cause to believe that the juvenile had committed a felony. *Id.* (citing MICH. COMP. LAWS § 712A.4(3)). Then, the court had to determine whether the interests of the juvenile were best served by waiving jurisdiction so that the juvenile could be tried as an adult in a criminal court. *Id.* (citing MICH. COMP. LAWS § 712A.4(4)). The court was required to consider the following five criteria when determining whether to waive jurisdiction:

> "(a) The prior record and character of the child, his physical and mental maturity and his pattern of living.

> "(b) The seriousness of the offense.
>
> "(c) Whether the offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under existing juvenile programs and statutory procedures.
>
> "(d) The relative suitability of programs and facilities available to the juvenile and criminal courts for the child.
>
> "(e) Whether it is in the best interests of the public welfare and the protection of the public security that the child stand trial as an adult offender."

People v. Dunbar, 423 Mich. 380, 385-86; 377 N.W. 2d 262, 263-64 (1985) (quoting MICH. COMP. LAWS § 712A.4(4)). The Michigan court rule was "substantially identical." *Id.*, 423 Mich. at 386; 377 N.W. 2d at 264.

A juvenile was entitled to an appeal of right in circuit court from the probate court's waiver of jurisdiction. *People v. Jackson*, 171 Mich. App. 191,195-96; 429 N. W. 2d 849, 852 (1988). After the deadline for filing a claim of right expired, he could apply for leave to appeal in the circuit court. *Id.*, 171 Mich. App. at 196; 429 N.W.2d at 852. Failure to appeal the juvenile court's decision to waive jurisdiction barred review of the issue in the Michigan Court of Appeals. *Id.*; *People v. Mahone*, 75 Mich. App. 407, 410; 254 N.W.2d 907, 909 (1977).

The standard for reviewing a juvenile court's waiver of jurisdiction over a juvenile defendant read as follows:

> "[W]e hold that an order waiving jurisdiction will be affirmed whenever the judge's findings, based upon substantial evidence and upon thorough investigation, show either that the juvenile is not amenable to treatment, or, that despite his potential for treatment, `the nature of his difficulty is likely to render him dangerous to the public, if released at age [nineteen], or to disrupt the rehabilitation of other children in the program prior to his release.'
>
> "We believe this holding hews a close line between the often competing interests of the juvenile and society. We emphasize, however, that the 'serious of the offense,' may not alone be used to determine the likelihood that a potentially amenable juvenile will endanger the public or other children in a rehabilitation program. The Legislature and the Supreme Court have indicated by statute and rule, respectively, that all of the waiver criteria shall be considered; thus, no reason appears why the 'seriousness of the offense' should gain preeminence over other factors to be assessed."

Dunbar, 423 Mich. at 387-88; 377 N.W. 2d at 264-65 (quoting *People v. Schumacher*, 75 Mich. App. 505, 511-12; 256 N.W.2d 39 (1977) (footnote and citations omitted)).

In 1988, the Michigan legislature amended the law to provide for automatic waiver of jurisdiction to circuit court of juveniles aged 15 to 17 who are charged with certain felonies, including murder. Dickens, 203 F.

Supp. 2d at 361-62 (citing MICH. COMP. LAWS § 600.606). This provision became effective after Petitioner's trial, but before the Michigan Court of Appeals affirmed his conviction and sentence.

C. The State Court Proceedings

Attorney Charles Campbell did not appeal the juvenile court's waiver of jurisdiction, and his failure to do so precluded Petitioner from raising the issue in the Michigan Court of Appeals. *Jackson*, 171 Mich. App. at 195; 429 N.W. 2d at 852. Petitioner alleges that Campbell squandered his best chance at avoiding exposure to a life sentence.[1]

The record does not indicate why Campbell did not appeal the juvenile court's waiver of jurisdiction. One of Petitioner's uncles has indicated in an affidavit that he and his brother retained Campbell to appeal the juvenile court's waiver of jurisdiction. Campbell moved to adjourn the preliminary examination in state district court, stating that this was a waiver from juvenile court and "[w]e have to study all of that and consider our options there and here. . . ." (Tr. Mar. 23, 1987, at 3). Later, however, he agreed to proceed with the preliminary examination. *Id.* at 3-5.

footnote begins

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[1] Had Petitioner been sentenced as a juvenile, he could have been released when he turned nineteen. (Tr. Mar. 10, 1987, at 81-82).

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footnote ends

Had Campbell acquired the transcript of the probate court hearing, the record would have revealed that child

psychologist Thomas Regan recommended "long term incarceration because of the morbidity of his pathology and his instability." (Tr. Mar. 10, 1987, at 71). Regan thought that time spent in the juvenile system would be insufficient to rehabilitate Petitioner. *Id.* at 71-72.

The trial court heard testimony from other experts at the hearing and then made the following findings:

> THE COURT: Based on the information the Court has before it, the Court makes the following findings relative to the criteria set forth in [the] statute relative to waiver.
>
> In terms of prior record, the Court finds that there is no prior record.
>
> In terms of character of the child, the court adopts the description set forth by Mr. Regan in his report. Specifically, that personality tests reveal a very angry and confused youngster who would be upset and agitated much of the time. An individual with this profile may have difficulty coping with the routine everyday living. They are usually overwhelmed to achieve or accomplish much of anything.
>
> Darrin's reality testing is compromised by his egocentricity and his perception of things would be unique and idiosyncratic. This is the type of youngster who broods, ruminates and worries. He would appear to be preoccupied and distant much of the time.
>
> Darrin demonstrates some interest in others and has the ability to identify, but his

agitation and instability leads to interpersonal friction. He is overly sensitive to rejection, slight or criticism, and prone to act in an aggressive manner. Darrin has difficulty in delaying his impulses and feelings, and may often get involved without delay and forethought. This is the type of youngster who, once stimulated, would become very intense in the expression of his feeling and have difficulty backing off.

There are some strong delinquency trends including egocentricity, impulsivity, self-indulgence, hostility and a strong disregard for rules and authority.

In terms of his maturity, he is a person physically and mentally mature. He is operating at the reading grade level of 5.4 and arithmetic level of 5.3.

In terms of his pattern of living, he comes from predominantly a single parent home where the parent is a female.

His father has chosen to abandon him at a very early age and has had minimal contact with his son. His father certainly does not provide a role model for his son, given his criminal background.

His mother I think probably has tried the best she can under the circumstances to provide for her son. Unfortunately, she has failed to provide him with a positive role model until very recently. It seems that until recently, until her recent marriage, she

basically has provided him with basically a female oriented home and/or a home where a male is involved but who is not of a positive role model.

I think that the grandmother has tried to be supportive of her daughter and of her grandson and has tried to intervene whenever it's been necessary for her to intervene, and to provide for her grandchild, probably to the best of her ability.

And I think that the mother herself has had a lot of problems. It seems as though she's been able to work those problems out. She had a drug addiction in her history and she has been committed to the Michigan Department of Corrections for some criminal involvement relative to unarmed robbery.

So this youngster has been exposed to a lot of negative criminal activity in relationship to the people that should be very meaningful to him. And so he has not had very positive role models.

He has not functioned well in school, and his grades certainly are evident of that.

I think until very recently, he's been able to maintain himself within the community without too much visibility in terms of criminal activity. But it's almost as though it's been festering within him and been building up. And when he ultimately does exhibit the antisocial behavior that's been building up within him, he doesn't mess around with the

small stuff; he goes right to the very big time an[d] deprive[s] somebody of their life.

According to the mother and the grandmother, he seems to be a person who has exhibited many of the interests that other children his age would normally show an interest in. So other than this lack of parental responsibility and the shifting between relatives, relative to care, it seems that his life is not any more unusual than many youngsters in our community.

In terms of seriousness of the offense, there's no doubt that murder first degree and felony firearm are extremely serious offenses.

In terms of whether this offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination the child may be beyond rehabilitation under existing juvenile programs and statutory procedures, the Court finds that that criteria is not applicable to this case, in that we do have a serious offense here. And secondly, there is no repetitive pattern of offenses.

In terms of relative suitability of programs and facilities available in the juvenile and criminal courts for the respondent, the juvenile justice system has an array of resources available to it. It has the Positive Peer Culture program, the Guided Group Interaction program, which is their predominant treatment modality.

Those are treatment modalities where group intervention is used to promote values within those that participate.

Based on the type of profile that has been projected by Mr. Regan and presented to the Court, it would appear that he is not a likely candidate that would benefit from either one of those programs, because these are programs where youngsters are dealing with their peers, where there is confrontation. And based on his profile, he is very likely to respond in a negative fashion and very quickly, and ultimately become disruptive of the program.

In terms of the Intensive Treatment, which is a small program available, and in terms of the juvenile justice system, it would appear that he is not an appropriate candidate for that program, because apparently that program deals with more vulnerable types of youngsters and not the kind that we have before us.

In terms of the camps, which would be the other programs provided by the Department of Social Services, it's clear from the testimony of the representative from the Department of Social Services that he would not be a candidate for that program, if in fact he were found guilty of this offense.

And so it would appear that those resources that are available in the juvenile justice system are not the kinds of programs that would be successful with this respondent, given his character and his personality traits.

It would appear that he's more in need of something that is akin to behavior modification, and that is not available in the juvenile justice system. He needs structure, supervision, educational and vocational training, with a milieu of behavior modification. And it would appear that those kinds of resources are available in the adult system.

I think the bottom line is that while the juvenile justice system has many programs, the nature of this youngster, given his personality and his diagnosis, is such that his prognosis, if subjected to those programs, would be very poor. It would seem that his problems are so deep-seated that it is going to take an extensive period of time to deal with him all his problems to get him to a point where he might continue to operate in our community in an appropriate fashion.

And our system is such that we must release him at age 19. And the evidence by the professionals is that he is not likely to be rehabilitated to the point where he would not be dangerous when released at age 19. So it would appear that we just do not have the time within which to work, even if he were amenable to the kind of treatment available to him in the juvenile justice system.

And then, finally, whether the best interest of the public welfare and protection of security is such that he should stand trial as an adult. It appears to me that if he is indeed

> guilty of the offenses of which he is charged, he is a very dangerous individual and needs to be put in a position where the public will not be in danger. And I would think that the priority here should be the safety of the public, and that is the priority of the adult system; and, therefore, it would be more appropriate that he be placed there.

Id. at 143-49.

To summarize, the court considered the statutory factors, namely, any prior record, the character of the child, his physical and mental maturity and pattern of living, the seriousness of the offense and whether it was part of a repetitive pattern, the suitability of available programs and facilities, and whether it was in the best interests of the public welfare and the protection of the public security that Petitioner stand trial as an adult offender. The court concluded that the criteria for waiver had been met and that Petitioner should be tried as an adult. *Id.* at 149.

Given the probate court's reasoned opinion, as well as the nature of the crime and the recommendation of an expert witness that Petitioner be tried as an adult, it is unlikely that Petitioner would have prevailed if Charles Campbell had appealed the probate court's decision to waive jurisdiction. Petitioner has not demonstrated a reasonable probability that, but for Campbell's failure to appeal the probate court's decision, the result of the proceeding would have been different. The Court of Appeals for the Sixth Circuit reached the same conclusion in a similar case. See *Spytma v. Howes*, 313 F.3d 363, 372 (6th Cir. 2002) (finding no prejudice in defense counsel's failure to appeal the waiver of juvenile court jurisdiction where

the petitioner was charged with murder and it was likely that he would have been transferred to adult court again if error were found on appeal and he was granted another transfer hearing).

Furthermore, to set aside a conviction or sentence solely because the outcome might have been different but for counsel's error could result in the defendant receiving a windfall to which the law does not entitle him. *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993). Sheer outcome determination is "not sufficient to make out a claim under the Sixth Amendment." *Id.* at 370. "The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding. . . ." *Id.* The result of the proceeding in this case was neither unfair nor unreliable in light of the 1988 amendment in the law, which provided for automatic waiver of jurisdiction to circuit court for a fifteen-year-old juvenile charged with murder.

IV. Conclusion

The Court concludes that, even if Charles Campbell's performance was deficient, his performance did not prejudice Petitioner. Petitioner's inability to show prejudice defeats his ineffectiveness claim as to Charles Campbell. Because Campbell was not ineffective, the Court's "inquiry is at an end; by definition, appellate counsel [Roman Karwowski] cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell,* 264F.3d 663, 676 (6th Cir. 2001), *cert. denied*, 535 U.S. 940 (2002). Accordingly, the state courts' denial of relief did not result in a decision that was contrary to federal law, an unreasonable application of clearly established law, or an unreasonable determination of the facts. Petitioner's application for the writ of habeas corpus is **DENIED**.

The Court declines to hold an evidentiary hearing because Petitioner's claims lack merit and because the parties have informed the Court that Charles Campbell is deceased and that Roman Karwowski has no memory of the case and no file on it. The Court is not convinced that, even if the facts were more fully developed, Petitioner would be able to demonstrate entitlement to relief. *Byrd v. Collins*, 209 F.3d 486, 550 (6th- Cir. 2000) (Jones, C.J.; dissenting) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)), *cert. denied*, 531 U.S. 1082 (2001); see also *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001) (affirming the district court's denial of an evidentiary hearing in part because the petitioner's claims lacked merit), cert. denied, __ U.S. __, 123 S. Ct. 136 (2002).

_____

NANCY G. EDMUNDS
UNITED STATES DISTRICT
JUDGE

Date: March 6, 2003

STATE OF MICHIGAN
COURT OF APPEAL

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

No. 104510

DARRIN HATCHETT,
Defendant-Appellant.

Before:McDonald, P.J., and Doctoroff and Neff, JJ.
PER CURIAM.

Following a bench trial on September 27, 1987, defendant was convicted of second-degree murder, MCL 750. 317; MSA 28.549 and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment on the second-degree murder conviction and two years' imprisonment on the felony-firearm conviction. Defendant now appeals as of right and we affirm.

Defendant first contends that the prosecutor failed to present sufficient evidence of malice to allow a rational trier of fact to conclude that this element of second-degree murder had been established beyond a reasonable doubt. Defendant also contends that the prosecutor failed to prove that defendant's actions were without justification, mitigation, or excuse and that the prosecutor failed to disprove defendant's claim of self-defense beyond a reasonable doubt. We believe that defendant's contentions are without merit.

To determine if there is sufficient evidence to support a conviction, the court must view the evidence in a light most favorable to the prosecution, and

determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979), reh den 407 Mich 1164 (1980), cert den sub nom Michigan v Hamption, 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980); People v Petrella, 424 Mich 221, 268-269; 380 NW2d 11 (1985).

The elements of second-degree murder are (1) that a death occurred, (2) that the death was cauaed by the defendant, (3) that the killing was done with malice, and (4) that it was done without justification or excuse. People v Porter,169 Mich App 190, 192; 425 NW2d 514 (1988), lv den 431 Mich 883 (1988).

Malice is the intention to kill, the intention to do great bodily harm, or the intention to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm is the probable result. People v Dykhouse, 418 Mich 488, 495; 345 NW2d 150 (1984); Porter, supra, 192-193. Malice must be established from circumstances that do not constitute excuse or justification or mitigate the degree of offense to manslaughter. Malice may be inferred from the facts and circumstances of the killing. Porter, supra, 193.

The trial judge found sufficient intent because defendant had the gun and fired it at the victim. Because there were multiple shots and because the victim was shot twice in the head, the trial court judge was convinced beyond a reasonable doubt that defendant intended to kill the victim. After reviewing the record and viewing the evidence in the light most favorable to the prosecution, we believe that the trial judge did not err in finding that the evidence was sufficient to support defendant's conviction.

We also believe that the trial court did not err in finding that the defense of self-defense was not available to defendant in this case. The testimony at trial revealed that defendant was the initial aggressor. The defense of self-defense is unavailable to an aggressor in a conflict. People v Livery Clark, 172 Mich 407, 418; ___ NW2d ___ (1988).

Defendant next. contends that he is entitiled to resentencing because his sentence of life imprisonment for the second-degree murder conviction was excessive. We disagree.

Our review of defendant's sentence is guided by People v Coles 417 Mich 523; 339 NW2d 440 (1983). Based on the standard enunciated in Coles, we cannot conclude that defendant's sentence was excessive. Given the facts of this case, defendant's sentence does not shock our consciences.

Affirmed.

/s/ Gary R. McDonald
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

Order

Michigan Supreme Court
Lansing, Michigan

Entered: November 29, 1989

Dorothy Comstock Riley
Chief Justice

~~85~~743 & (29)

Charles L. Levin
James H. Brickley
Michael E Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

PEOPLE 0F THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 85743
COA:104510
LC: 87-002645

DARRIN HATCHETT,
Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal and request for review under MCR 7.303, are considered. Since the defendant has applied for leave to appeal, the letter request is DENIED as moot. The delayed application is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

41121

SEAL OF THE MICHIGAN SUPREME COURT

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 29, 1989

/s/
Corbin R. Davis

Court of Appeals, State of Michigan

ORDER

Jane E. Markey
Presiding Judge

People of MI v Darrin Hatchett

Docket No. 209790

LC No. 87-002645

Barbara B. McKenzie
David H. Sawyer

Judges

The Court orders that the delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SEAL OF THE MICHIGAN COURT OF APPEALS

A true copy entered and certified by Carl L. Gomek, Chief Clerk on

March 1, 1999

/s/
Carl L. Gromek

Order

Michigan Supreme Court
Lansing, Michigan

Entered: September 29, 1999
114355

Elizabeth A. Weaver,
Chief Justice
James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Mauna D. Corrigan
Robert P. Young, Jr.,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 114355
COA: 209790
Rec Ct: 87-002645

DARRIN HATCHETT,
Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal from the March 1, 1999 decision of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

H0921

SEAL OF THE MICHIGAN SUPREME COURT

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 1999

/s/
Corbin R. Davis

[Testimony of Eric Minor, Transcript dated September 29, 1987, pp 8-13]

[Page 8, T, 9/29/87]

A. Yes.

Q. Mr. Minor, I would like to draw your attention to December 29, 1986, at about 6:15, in the evening, and ask you if at that time, you were at a residence in the City of Detroit known as 9145 Mendota?

A. Yes.

Q. Who lived there, sir?

A. Michael.

Q. What were you doing there?

A. Playing pool.

Q. Anyone else there?

A. Yes.

Q. Who all was there?

A. K.C., Rodney and Darrin.

Q. K.C. and who?

A. Rodany and Darrin.

Q. Rodney McCrae?

A. Yes.

Q. Is that person known by Lloyd Whitfield, K.C.?

A. Yes.

Q. You said that you were playing pool.
Who were you playing pool with?

A. Rodney.

Q. Did something happen while playing pool?

A. Yes.

[Page 9, T, 9/29/87]

Q. What happened, sir?

A. Darrin shot Rodney.

Q. Did you see that happen?

A. Yes.

Q. Prior to Darrin shooting Rodney, anyone say anything to each other?

A. Yes.

Q. Did Rodney say anything to –

A. Hi to him.

Q. Did he say anything else? Do you remember?

MR. COOPER: Actually, Judge, I object on the grounds of hearsay, what Rodney said. I don't see any exception.

THE COURT: Part of the res gestae. Overrule the objection.

MR. COOPER: Okay.

MR. BECK: Do you remember if Rodney said anything?

A. You still mad at me?

Q. (By Mr. Beck). Who did he say that to?

A. Darrin.

Q. Did you know what he was talking about at that time?

A. No.

Q. Did Darrin say anything to Rodney as a result of Rodney asking him are you still mad at up?

[Page 10, T, 9/29/87]

A. Told him to shut up, punk.

Q. What happened?

A. Darrin left.

Q. Did you see where he went?

A. No.

Q. Do you know if he left Michael Howard's house?

A. Yes.

Q. How do you know that?

A. He went outside the side door.

Q. Did there come a time when Darrin came back?

A. Yes.

Q. How long was it between the time he left and the time he came back?

A. About five minutes.

Q. After he came back, what happened then?

A. He ran down the stairs and started shooting.

Q. Did he say anything before he started shooting?

A. He said - -

THE COURT: We are trying to understand you. Slow down.

THE WITNESS: Talk your junk now, punk.

Q. (By Mr. Beck). Who did he say that to?

A. Rodney.

Q. Where was Rodney?

A. On the side of the pool table with me.

[Page 11, T, 9/29/87]

Q. You said that you saw Darrin shoot him. Did you see where Darrin shot him?

A. No.

Q. Do you know how many times Darrin shot?

A. About five.

Q. What did Rodney do after he shot?

A. Fell.

Q. After Rodney fell, did Darrin shoot anymore?

A. After he fell, I ran up the stairs. Then he ran up after me.

Q. Who did?

A. Darrin, and he clicked the gun, but no bullets.

Q. Was he pointing the gun anywhere?

A. At me.

Q. Did he say anything to you?

A. He said, what I'm doing? I was going outside. He said, if I say something -- if I tell, he'll blow my house up.

Q. After that, did anything happen, sir?

A. Yes, we left.

Q. Who left?

A. Me and Darrin.

Q. What did you do when you left?

A. He said that he had to get one of his friends to help him get the body out.

Q. Did you go get one of his friends?

[Page 12, T, 9/29/87]

A. Yes.

Q. What did you do after you got this person?

A. Came back.

Q. And what happened then when you came back? Did you go back into the house?

A. Yes.

Q. Back in the basement?

A. Yes.

Q. Rodney still there?

A. Yes.

Q. What happened then?

A. His friend looked and left.

Q. He looked?

A. At the body, and he ask me why he do it, and left.

Q. Did you know what that person's name was?

A. No.

Q. Could you tell what kind of gun Darrin had when he shot?

A. All I know it was small, black and a revolver.

Q. Had there been any arguments in your presence while playing pool with Darrin McCrae and Darrin Hatchett? Any argument between the two?

A. No.

Q. Did Rodney have any weapons?

A. No.

Q. Now, this individual that came back made a statement to **[Page 13, T, 9/29/87]** Mr. Hatchett after he viewed the body, after the person that you and Mr. Hatchett went to get to help remove the body.

He came back and went into the basement?

A. He didn't go in the basement. He stood in the doorway.

Q. Stood in the doorway?

A. Yes.

Q. Rodney's body could be seen from the doorway?

A. Yes.

Q. He made a statement to Darrin?

A. Yes.

Q. Did Darrin say anything after that person made the statement to Darrin, after he asked him that question?

A. Not that I know of.

Q. Did Darrin do anything -- well, did you eventually - - was Rodney's body moved?

A. Yes.

Q. How was it moved? What happened to his body?

A. We put it in a dumpster.

Q. Who did that?

A. Me, Darrin, Michael--- I don't really know if K.C. did or not.

Q. How did you get to the dumpster?

A. Picked up.

Q. After it was put in the dumpster, did you go back into

[Testimony of Michael Howard, Transcript dated September 29, 1987, pp 34-38]

[Page 34, T, 9/29/87]

MICHEAL HOWARD

called as a witness on behalf of the People, was duly sworn in by the Court Clerk and testified as follows:

DIRECT EXAMINATION

BY MR BECK:

Q. What is your name young man?

A. Michael Howard.

Q. How old are you?

A. Sixteen.

Q. Mr. Howard, I would like to draw your attention to last December 29th?

A. Uh-huh.

Q. At about 6:30, 6:15 in the evening, were you living at 9145 Mendota, City of Detroit?

A. Yes, I was.

Q. Were you, in fact, at home at that time?

A. Yes.

Q. Do you remember who was there with you?

A. Me, Darrin, Rodney and Lloyd.

Q. Is that K.C.?

[Page 35, T, 9/29/87]

A. Yes and Eric.

Q. Eric Minor?

A. Uh-huh.

Q. Were you all in the basement?

A. Yes.

Q. What were you doing at that time?

A. I was just downstairs.

Q. Was anybody shooting pool?

A. Yes.

Q. Who was?

A. Rodney, and I think Eric.

Q. Now, did you observe any disagreement or arguments while you were down there?

A. No.

Q. Did you hear whether or not Rodney MaCrae said anything to Darrin Hatchett?

A. Yes.

Q. What did he say to him?

MR. COOPER: Objection. Same objection.

THE COURT: That objection is preserve. I think it is part of the res gestae.

A. He said, how you doing? Hello.

Q. (By Mr. Beck). Something to that effect?

A. What?

Q. What's up, or how you doing?

A. Yes.

[Page 36, T, 9/29/87]

Q. Darrin Hatchett say anything to him?

A. Don't say nothing to me.

Q. By the way, I'll ask you if you see Darrin Hatchett in the court?

A. Yes.

Q. Seated next to Mr. Cooper?

A. Yes.

Q. Thank you.

What happened after Mr. Hatchett spoke to Rodney McCrae?

A. He had left.

Q. Who left?

A. Darrin.

Q. Did you see him leave?

A. Yes.

Q. Do you remember how he left?

A. Through the side door.

Q. And what happened then?

A. Then K.C. went upstairs, and Eric an rodney (sic) were still downstairs. Darrin came back.

Q. Where were you?

A. At that time I went upstairs because we were eating and came back down and answered the door, and K.C. went up to use the bathroom and Darrin came down and shot Rodney.

Q. Did you see that?

[Page 37, T, 9/29/87]

A. Yes.

Q. Where were you when you saw that?

A. First I was on the stairs.

Q. Were you - - Which stairs were you on? There are two steps, one coming from upstairs to the landing—

A. The one from the basement.

Q. Do you remember how many times Darrin shot Rodney?

A. Four.

Q. Do you remember how far a part they were? Can you tell me here in court? I will walk up and you let me know.

A. Right there.

Q. About right here?

A. Yes.

Q. How wide is your basement?

A. Probably from the wall to about where you are standing.

MR. BECK: Counsel would you stipulate about 23 feet?

MR. COOPER: Okay.

Q. (By Mr. Beck) . Was there anything obstructing the area or when Darrin shot Rodney?

A. Pool table.

Q. What kind of pool table do you have?

A. About a seven footer.

Q. Do you remember how the shots were fired?

A. Yes.

[Page 38, T, 9/29/87]

Q. How were they fired?

A. He first shot him in the his chest or the heart, and then in the side, and then he fell, and then he shot him twice in the head.

Q. When he fell -- Rodney fell?

A. Rodney fell.

Q. After Rodney fell, did Darrin get any closer to Rodney?

A. Yes, he went around the pool table where Rodney was laying, and he was probably about three away from him. Two or three feet.

Q. And then?

A. Shot him twice in the head.

Q. Did you see that?

A. Yes.

Q. Do you remember whether or not Darrin said anything to Rodney when he came down the steps?

A. Yes.

Q. What was that?

A. What was all of that that you were saying, and then Rodney looked, and he pulled the pistol and he shot, and Rodney grabbed his chest and said, he shot me, and Darrin shot him again and he fell to the ground, and I said, no more, and he went and shot him twice to the head.

Q. Did you ever see Rodney threaten Darrin?

A. No.

[Testimony of Lloyd Whitfield, Transcript dated September 29, 1987, pp 59-62]

[Page 59, T, 9/29/87]

LLOYD WHITFIELD

called as a witness on behalf of the People, was duly sworn in by the Court Clerk and testified as follows:

DIRECT EXAMINATION

BY MR. BECK:

Q. What is your name, young man?

A. Lloyd.

Q. Lloyd what?

A. Whitfield.

Q. You got a nickname?

A. K.C.

Q. How old are you?

A. Sixteen.

Q. You know somebody by the name of Darrin Hatchett?

A. Yeah.

Q. See him in court?

A. Yes.

Q. Point to him, please, and tell me what he is wearing?

A. Guy with a sweater and afro.

MR. BECK: Indicating the person of the defendant.

[Page 60, T, 9/29/87]

Q. (Continuing). I will draw your attention to December 29, 1986, at about 6 o'clock in the evening, 6:15, in the that area. Were you at Michael Howard's house?

A. Yes.

Q. On Mendota Street?

A. Uh—huh.

Q. Do you remember who else was there?

A. Michael, Howard, Eric, me and him. Rodney.

Q. Now, how long had you been at Michael's house that day before the incident took place?

A. All day.

Q. Been there all day. Were you on Christmas vacation or something? You have to answer yes or no?

A. Yes.

Q. Because he is taking it down. That's why you have to speak.

I want to ask you if there was a time that you played any pool down there that day?

A. Yes.

Q. Who did you shoot pool with?

A. Yes.

Q. With who?

A. Mike.

Q. About 6 o'clock, were you doing anything in particular? Were you downstairs, upstairs?

[Page 61, T, 9/29/87]

A. I think we were playing pool. I went to use the bathroom.

Q. I will ask you about that.

When you up in the bathroom, did you hear anything when in the bathroom?

A. I heard shots.

Q. How many did you hear?

A four.

Q. Do you recall how they occurred; in other words, I'm asking you, did it all happen at once or any space between any of them?

A. It was first two. Then about two or three seconds later the last two.

Q. After you heard those, what did you do?

A. I jumped up and went downstairs.

Q. Did you see anything downstairs?

A. Yes.

Q. What did you see?

A. I saw Rodney laying on the floor.

Q. See anybody else in the basement?

A. Uh-huh. Yes. Everybody.

Q. What was everybody doing?

A. Staring at Rodney.

Q. Did you see Darrin?

A. Yes.

[Page 62, T, 9/29/87]

Q. Did you say anything to him?

A. No.

Q. Did Darrin say anything when you saw him?

A. He was excited.

Q. Did he say anything?

A. He was just cussing. He said that he didn't want to go back to jail.

Q. Did he say anything about Rodney, if you recall?

A. He said that he shouldn't have made him mad.

Q. While in the basement, were you down there while Rodney and Darrin Hatchett were down there together?

A. Yes.

Q. Did you-- before the shooting, did you see any argument or anything down there?

A. No.

Q. Did you ever see Rodney with a weapon of any kind?

A. No.

Q. After you went down there and saw everybody, what happened then?

A. Darrin had left.

Q. And what did you do after he left?

A. We cleaned up the blood.

Q. Did Darrin come back?

A. Uh—huh. Yes.

Q. Was he alone when he came back?

[Testimony of Darrin Hatchett, Transcript dated September 29, 1987, 79-81]

[Page 79, T, 9/29/87]

opened the door up, and I was going in the basement and Michael said he would be down in the minute because he was eating. When I got in the basement, I went to the other side of the room, and me and Rodney were arguing a little more, and I pulled the gun and said, talk your junk. I aimed the gun like that and said that and I fired it, and I didn't know if he grabbed--- it looked like he went for something and I shot some more.

Q. First of all, are you right or left-handed?

A. Left-handed.

Q. You have the gun in a pocket?

A. Yes.

Q. Which one?

A. Left pocket.

Q. In what item of clothing?

A. Coat.

Q. You pulled it out?

A. Yes.

Q. This is during an argument?

A. Yes.

Q. Still arguing?

A. Yes.

Q. When you saw him down there, why didn't you leave?

A. I figured they would be leaving again pretty soon.

Q. But the arguing continued?

[Page 80, T, 9/29/87]

A. Yes.

Q. You pulled the gun out and said something like, talk your junk now?

A. Yes.

Q. You got the gun?

A. Yes.

Q. Figured he would shut up?

A. Yes.

Q. Did he shut up?

A. No.

Q. So you aimed it where?

A. I tried to aim it on the side of him, like more to go pass his shoulder.

Q. Did you pull the trigger?

A. Yes.

Q. You don't know if that first bullet hit him or not?

A. Yes.

Q. But he grabbed in that direction?

A. Yes.

Q. Did you know if he was grabbing-- did you know where he was grabbing?

A. No.

Q. Grabbing like toward his side?

A. Yes.

Q. Then what goes on in your mind, Mr. Hatchett?

[Page 81, T, 9/29/87]

A. I thought that he was going for something. I thought a gun, and then I started firing some more.

Q. You heard testimony that you shot him in the head?

A. Yes.

Q. Is that the true?

A. Yes.

Q. Were you aiming at the head or aiming at the body?

A. I was just aiming.

Q. How many shots— how many times did you pulled the trigger?

A. Four.

Q. Okay. You realize this person was dead?

A. He wasn't dead at that time.

Q. After the four shots, he was not dead yet?

A. No.

Q. What led you believe he was not dead?

A. He was still moving.

Q. He was on the floor though?

A. Yes.

Q. Okay. Then what do you do?

A. After I shot him, we were standing there looking. Eric had jumped. He tried to run for the stairs. I said, wait a minute. Where you going. He said, going outside for a minute, and I

said, wait a minute. Wait a minute, and then Michael said, we got to do something with the

[Testimony of Thomas Regan, Transcript Of Motion Requesting Waiver Disposition dated March 10, 1987, pp 67-68]

[Page 67, T, 3/10/87]

or whether he can score higher.

Q. You'd require more testing, more observation?

MR. McCLINTON: Your Honor, the question has been asked and answered. He answered the question to the best of his ability. He's trying to get him to say something that obviously he cannot say at that particular time.

He hasn't done any more testing. There is no more testing to be done. This is a hearing. This is it.

He can't answer the question. He's already said, "I don't know."

THE COURT: Is that what you said?

THE WITNESS: Yes, that's what I said.

THE COURT: Sustain the objection.

Q. (By Mr. Wolock, continuing): You state in your report that "Personality tests reveal a very angry and confused youngster."

What did you mean by that?

A. The tests revealed a youngster who has a lot of inner hostility, and also a youngster whose thinking is quite confused.

Q. You state his reality testing is compromised by his egocentricity and his perception of things would be unique and idiosyncratic.

What does that mean, or what did you mean by that?

[Page 68, T, 3/10/87]

A. That youngsters that score at his level of reality testing just don't see things the way other people do. They tend to be kind of idiosyncratic in their own way. Their thinking is a little bit unusual.

Q. You state, "This is the type of youngster who, once stimulated, would become very intense in the expression of his feelings and have difficulty backing off."

What do you mean by that, sir?

A. To me, that says it very well.

I mean, I don't know what you mean when you say, "What do you mean by that?" It's very plain.

Q. It means what it said?

A. It's very plain, yes.

Q. You say, "There are strong delinquent trends including egocentricity, impulsivity, self-

indulgence, hostility and a strong disregard for rules and authority."

What did you mean by "delinquent trends?"

A. Well, those are the features you see in a delinquent profile. You see the egocentricity, the impulsivity, the self-indulgence, and then the disregard for rules, authority--things like that.

Q. Based on your testing, was there any indication of drug involvement?

A. There's no way to tell from the tests if there's drug involvement.

[Testimony of Thomas Regan, Transcript Of Motion Requesting Waiver Disposition dated March 10, 1987, pp 71-72]

[Page 71, T, 3/10/87]

program.

Q. Are you saying that even if he has a learning disability, he has potential for finishing high school as far as a GED?

A. A fifth grade level for reading is high enough to get through high school.

Q. You state there needs to be availability of psychiatric consultation or intervention.

A. Yes.

Q. What did you mean by that?

A. This is a very unstable youngster who may experience crises where he may need some intervention from medical personnel; if not, that maybe the staff where he's at would need some consultation in terms of how to handle situations.

Q. You state in your report, "This young man needs long term incarceration because of the morbidity of his pathology and his instability."

What did you mean by "long term"?

A. I mean that this is a youngster who is quite impaired in terms of both his delinquent trends

and the instability of the personality, and it's not something that you're going to take care of in 10 or 12 months' time.

Q. You state, "The time that he would have in the juvenile system would not be enough time to rehabilitate him to the point where he would be considered, in the opinion of this examiner, as not dangerous to others in the community.

[Page 72, T, 3/10/87]

Why?

A. Because the--what I see in the testing is a youngster who is just very unstable, very disturbed, as well being strongly delinquent. And I don't feel that the length of time in the juvenile system is long enough to guarantee that this youngster would not be dangerous when he is released.

Q. Can he benefit from the programs in the young adult system in the adult system?

A. Yes

Q. Which programs would he benefit from?

A. From the educational program.

Q. As far as the state you find the young man in now, do you have any explanation for what--why he's like that?

I mean, is this just something that happens, you know, at birth? Is something

missing at a young age? Do you have any explanation for what's happening here?

A. I can just speculate like anyone else. But what the testing seem to reveal, it's just a long standing youngster who's been pretty unstable probably most of his life.

Q. If I read Mr. Gregurek's report accurately, there's some school problems but nothing serious enough.

As far as you can tell from the report, he's never come to the attention of the court here, or the court in California, or any other so—called criminal activity.

[Testimony of Thomas Regan, Transcript Of Motion Requesting Waiver Disposition dated March 10, 1987, pp 81-82]

[Page 81, T, 3/10/87]

just to deal with crisis situations that are going to arise with this kind of personality.

Q. Now, how long do you think this type of treatment that you're envisioning might be necessary before the young man might start to turn around?

A. I see a young man who's probably going to have emotional difficulties most of his life. So whatever support he can get would be helpful.

Youngsters or young men like this can make marginal adjustments. They have difficulty holding down jobs and relating to people, because they just are overwhelmed easily. They get upset easily. They get agitated easily.

So as he gets older I think he probably is going to learn to deal with those situations better. And the more support he has, I think the more help that's going to be for him. But--

Q. So you don't think within four years he might be in a situation--if he's given the right vocational training, or given some vocational training, or some psychiatric counseling, some role model counseling, that within a four- year period of

time he might not be able to function in a more appropriate manner?

I am not saying to completely function. It may not be as an average 19, 20 year old who's never been **[Page 82 T, 3/10/87]** incarcerated or that kind of thing. But to be able to function in our society?

A. I feel there would be some improvement. I think any amount of training, structure, or anything like that, is going to improve his chances of succeeding.

Q. Now, you're aware of the fact if he stays in the juvenile system he could remain here until age 19. Is that correct?

A Yes.

Q So that would give the juvenile system four years to work with him. Is that correct?

A Yes.

MR. WOLOCK: Your Honor, I believe the date of birth is 9-5-71. I don't believe that maybe is four years.

MR. McCLINTON: Three years.

MR. WOLOCK: Three and a half years.

MR. McCLINTON: Three and a half years.

Q. (By Mr. McClinton, continuing): Within three and a half years, would there be enough improvement, do you feel, that he could begin to function without the hostility that you envision, or the intense feelings that he has?

A. No, I don't think that's enough time.

Q. How much time do you think would be required, Doctor?

A It's really hard to say specifically how much time.

Q. You don't know if it's 10 years or 20 years or anything like that?

[Testimony of Thomas Regan, Transcript of Motion Requesting Waiver Disposition dated March 10, 1987, p 92]

[Page 92, T, 3/10/87]

of thing?

A. The thing with him is, he can't stop himself. He just gets overwhelmed.

Q. Once they help him to learn to stop that kind of behavior, isn't that part of the group's endeavor?

A. That's part of the group's endeavor, yes.

MR. McCLINTON: Nothing further, Your Honor.

MR. WOLOCK: Any questions, Your Honor?

EXAMINATION

BY THE COURT:

Q. Mr. Regan, what would you say is the diagnosis of this respondent and his problem?

A. At this point I would call it a mixed disturbance of conduct and emotions.

Q. Does that mean his problems are primarily characterological in nature?

A. I see a real mixture with this youngster. I see characterological features along with a lot of other emotional kinds of features.

Q. What would you say your prognosis is?

A Poor.

Q Am I correct in interpreting what you're saying is that he is not treatable in the sense that he's going to be cured; or whatever his problem is, it is a matter of more controlling the behavior rather than changing his profile?

[Findings of Judge Barsamian, Transcript of Motion Requesting Waiver Disposition, dated March 10, 1987, pp143-149]

[Page 143, T, 3/10/87]

others in the community.

I believe on the stand he was even more explicit as far as this young man, that it's not set up for this young man, or its programs, nor does it have time for this young man or his problems, nor is there time sufficiently to help this young man. That even at 15 1/5 he is beyond the assistance of the juvenile system.

We would argue that the other criteria also have been met, and when weighed against the other criteria, as far as amenability to treatment, as far as facilities available, as far as safety of society, unfortunately the grounds for waiver have been made out. That there's a very tragic case. I don't believe the court has much choice, given the testimony that the Court has heard, unfortunately.

THE COURT: Based on the information the Court has before it, the Court makes the following findings relative to the criteria set forth in statute relative to waiver.

In terms of prior record, the Court finds that there is no prior record.

In terms of character of the child, the court adopts the description set forth by Mr. Regan in his report. Specifically, that

personality tests reveal a very angry and confused youngster who would be upset and agitated much of the time. An individual with this profile may have **[Page 144, T, 3/10/87]** difficulty coping with the routine everyday living. They are usually overwhelmed to achieve or accomplish much of anything.

Darrin's reality testing is compromised by his egocentricity and his perception of things would be unique and idiosyncratic This is the type of youngster who broods, ruminates and worries. He would appear to be preoccupied and distant much of the time.

Darrin demonstrates some interest in others and has the ability to identify, but his agitation and instability leads to interpersonal friction. He is overly sensitive to rejection, slight or criticism, and prone to act in an aggressive manner. Darrin has difficulty in delaying his impulses and feelings, and may often get involved without delay and forethought. This is the type of youngster who, once stimulated, would become very intense in the expression of his feeling and have difficulty backing off.

There are some strong delinquency trends including egocentricity, impulsivity, self-indulgence, hostility and a strong disregard for rules and authority.

In terms of his maturity, he is a person physically and mentally mature. He is operating at the reading grade level of 5.4 and arithmetic level of 5.3.

In terms of his pattern of living, he comes from predominantly a single parent home where the parent is a female.

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His father has chosen to abandon him at a very early age and has had minimal contact with his son. His father certainly does not provide a role model for his son, given his criminal background.

His mother I think probably has tried the best she can under the circumstances to provide for her son. Unfortunately, she has failed to provide him with a positive role model until very recently. It seems that until recently, until her recent marriage, she basically has provided him with basically a female oriented home and/or a home where a male is involved but who is not of a positive role model.

I think that the grandmother has tried to be supportive of her daughter and of her grandson and has tried to intervene whenever it's been necessary for her to intervene, and to provide for her grandchild, probably to the best of her ability.

And I think that the mother herself has had a lot of problems. it seems as though she's been able to work those problems out. She has a drug addiction in her history and she has been committed to the Michigan Department of Corrections for some criminal involvement relative to unarmed robbery.

So this youngster has been exposed to a lot of negative criminal activity in relationship to the people that should be very meaningful to him. And so he has not had very positive role models.

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He has not functioned well in school, and his grades certainly are evident of that.

I think until very recently, hers been able to maintain himself within the community without too much visibility in terms of criminal activity. But it's almost as though it's been festering within him and been building up. And when he ultimately does exhibit the antisocial behavior that's been building up within him, he doesn't mess around with the small stuff; he goes right to the very big time an deprive somebody of their life.

According to the mother and the grandmother, he seems to be a person who has exhibited many of the interests that other children his age would normally show an interest in. So other than this lack of parental responsibility and the shifting between relatives, relative to care, it seems that his life is not any more unusual than many youngsters in our community.

In terms of seriousness of the offense, there's no doubt that murder first degree and felony firearm are extremely serious offenses.

In terms of whether this offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination the child may be beyond rehabilitation under existing juvenile programs and statutory procedures, the Court finds that that criteria is not applicable **[Page 147, T, 3/10/87]** to this case, in that we do have a serious offense here. And secondly, there is no repetitive pattern of offenses.

In terms of relative suitability of programs and facilities available in the juvenile and criminal courts for the respondent, the juvenile justice system has an array of resources available to it. It has the Positive Peer Culture program, the Guided Group Interaction program, which is their predominant treatment modality.

Those are treatment modalities where group intervention is used to promote positive values within those that participate.

Based on the type of profile that has been projected by Mr. Regan and presented to the Court, it would appear that he is not a likely candidate that would benefit from either one of those programs, because these are programs where youngsters are dealing with their peers, where there is confrontation. And based on his profile, he is very likely to respond in a negative fashion and very quickly, and ultimately become disruptive of the program.

In terms of the Intensive Treatment, which is a small program available, and in terms of the juvenile justice system, it would appear

that he is not an appropriate candidate for that program, because apparently that program deals with more vulnerable types of youngsters and not the kind that we have before us.

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In terms of the camps, which would be the other programs provided by the Department of Social Services, it's clear from the testimony of the representative from the Department of Social Services that he would not be a candidate for that program, if in fact he were found guilty of this offense.

And so it would appear that those resources that are available in the juvenile justice system are not the kinds of programs that would be successful with this respondent, given his character and his personality traits.

It would appear that he's more in need of something that is akin to behavior modification, and that is not available in the juvenile justice system. He needs structure, supervision, educational and vocational training, with a milieu of behavior modification. And it would appear that those kinds of resources are available in the adult system.

I think the bottom line is that while the juvenile justice system has many programs, the nature of this youngster, given his personality and his diagnosis, is such that his prognosis, if subjected to those programs, would be very poor. It would seem that his problems are so deep-seated that it is going to take an extensive

period of time to deal with him and his problems to get him to a point where he might continue to operate in our community in an appropriate fashion.

And our system is such that we must release him at age 19. And the evidence by the **[Page 149, T, 3/10/87]** professionals is that he is not likely to be rehabilitated to the point where he would not be dangerous when released at age19. So it would appear that we just do not have the time within which to work, even if he were amenable to the kind of treatment available to him in the juvenile justice system.

And then, finally, whether the best interest of the public welfare and protection of security is such that he should stand trial as an adult. It appears to me that if he is indeed guilty of the offenses of which he is charged, he is a very dangerous individual and needs to be put in a position where the public will not be in danger. And I would think that the priority here should be the safety of the public, and that is the priority of the adult system; and, therefore, it would be more appropriate that he be placed there.

Therefore, the Court feels the criteria for waiver have been met, and the Court will waive him to the Recorder's Court of the City of Detroit for trial as an adult on the offense of murder first degree and felony firearm.

The Court will advise him that he is entitled to appeal the decision of this Court to a

higher court. If he can't afford counsel, counsel will be provided for him, as well as transcripts.
(Whereupon the above-entitled matter was adjourned)

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE
COUNTY OF WAYNE
JUVENILE DIVISION

in the Matter of: Juvenile Court File No. 258,252

DARRIN HATCHETT Birthdate: September 5, 1971

_____/

OPINION GRANTING WAIVER

In a petition dated December 20, 1986, Darrin Hatchett was charged with Murder, First Degree, and possession of a Firearm in the Commission or Attempt to Commit a Felony. These offenses are alleged to have been committed on December 29, 1986 in the City of Detroit.

Motion for Waiver of Jurisdiction was filed by the Prosecutor. On January 20, 1987, a hearing on the first phase of the Waiver proceeding was held and probable cause was found by the court on the offenses alleged in the petition and motion.

A dispositional hearing was held on March 10, 1987, resulting in the granting of the Motion for Waiver.

It is alleged that the respondent, the complainant and two other youths were in the basement of the home belonging to the family of one of the youths. The complainant and one of the youths were playing pool, when the complainant asked the respondent if he was still mad at him. Respondent told the complainant not to say anything to him and left the house. Respondent returned five minutes later confronting the complainant, saying "talk your junk now," and started shooting. The complainant was shot four times and died. When one of

the other youth began to run, the respondent is alleged to have aimed the gun at him and fired, but the gun only clicked. He ordered the youths not to tell what happened. Respondent went to get someone to help him remove the body, but he refused to help. Respondent then ordered the other youth to help him carry the body to a trash dumpster.

During the dispositional hearing, investigation was conducted by the Court, at which time testimony was taken from Thomas Patrick Regan, Psychologist, Wayne County Clinic for Child Study; Frank Gregurek, Jr., Probation Officer, Wayne County Juvenile Court. Gloria Postell, Delinquency Intake Worker, Department of Social Services; Gary Kasenow, Parole supervisor, Michigan Department of Corrections.

Based on the information garnered during the dispositional phase, the Court found in accordance with the criteria set forth in M.J.C. 712A.4(4) as follows:

Criteria I - The respondent is a 15.6 year old youth, who has no prior record.

His diagnosis is mixed disturbance of conduct and emotions. His problems are deep seated and of long standing. His prognosis for rehabilitation is poor.

Respondent is a very angry and confused person who would be upset and agitated much of the time. Individuals with this profile may have difficulty coping with the routine of everyday living and are usually too overwhelmed to achieve or accomplish much of anything.

Respondent's reality testing is compromised by his egocentricity and his perception of things would be

unique and idiosyncratic. He is the type of person who broods, ruminates and worries. He would appear to be preoccupied and distant much of the time.

The Respondent demonstrates some interest in others and has the ability to identify, but his agitation and instability leads to interpersonal friction. He is overly sensitive to rejection, slight or criticism, and prone to act in an aggressive manner. Respondent has difficulty in delaying his impulses and feelings, and may often get involved without delay and forethought. He is the type of person who, once stimulated, would become very intense in the expression of his feelings and have difficulty backing off. This profile is consistent with the alleged facts of this case.

There are also strong delinquency trends including egocentricity, impulsivity, self-indulgence, hostility and a strong disregard for rules and authority.

Respondent is physically and mentally mature. He operates within the average range of intelligence. His reading grade level is 5.4 and his arithmetic grade level is 5.3.

Respondent's parents were never married, nor aid they ever live together. His natural father is a career criminal, who is currently incarcerated in the Western Wayne County Correctional Facility, and has had minimal contact with the respondent.

His mother was a teenager when she conceived and delivered the respondent, and has been the primary caretaker, except for a couple of times that she has relied on the maternal grandmother to assume that responsibility. The mother is a recovering drug addict who was incarcerated for armed robbery. Since her

release, she has been drug free, married and apparently doing well. She currently resides with her husband, a career soldier, in West Germany. At the time of this incident, respondent resided with his maternal grandmother because he did not want to go to West Germany. Both the mother and maternal grandmother perceive the respondent as being a good boy, who did not present a problem in the home. Respondent has had learning and behavior problems in school. He was suspended from school once while he was a student in California.

Criteria II - The offenses with which respondent is charged are very serious.

Criteria III - This criteria is not applicable since respondent is charged with very serious offenses and there are no prior offenses.

Criteria IV - The respondent is a very disturbed and unstable person with strong delinquency tendencies. He will require a lot of structure, supervision plus academic and vocational training. There is a real question as to whether he is amenable to treatment in either the juvenile or adult criminal system.

The predominant treatment modality available in the Juvenile Justice system is either Positive Peer Culture or Guided Group Interaction, which use group processes to bring about positive social values and behavior. Respondent's personality traits will not enable him to participate in a group process in a meaningful manner. He would evoke negative responses and confrontation from his peers. He would overreact to group interaction and not be able to internalize program goals. Respondent's response to a group rehabilitative process would be such that he would be disruptive in

any treatment program of which he was a part. While the Juvenile Justice system has an excellent academic program, it does not provide any vocational training.

As indicated previously, there is a real question as to the respondent's amenability to treatment. It will take a long time to even begin to penetrate the respondent is a meaningful way. Mr. Regan indicated that it will take four years to see some improvement, and that there is not enough time left in the Juvenile Justice system to complete the treatment process. The Juvenile Justice system has a limited period of time within which to attempt rehabilitation - it must release the respondent at age nineteen. The nature of respondent's difficulties are such as would likely render him dangerous to the public if released at age nineteen.

Respondents profile would not be unusual in the adult system, and it can provide the structure, supervision and time needed. The adult system has no time limit, other than the sentence imposed, and can provide the therapy, educational and vocational programs as needed and appropriate.

Criteria V - If respondent is found guilty of the offenses charged, he is a dangerous person, and the probability that he will repeat his anti-social behavior is very high. He would -represent a great risk to the community. If found guilty of the alleged offenses, it is in the best interest of the public welfare and the protection of public security that the respondent be treated in the adult system.

It is the opinion of the Court, based on the above findings, that Darrin Hatchett meets the criteria set forth in the statute.

/s/

Y.Gladys Barsamian
Judge of Probate
Juvenile Division

YGB:smp
March 27, 1987